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No. 05-1424

Supreme Court, U.S.
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In the Supreme Court of the United States

METROPOLITAN LIFE INSURANCE COMPANY
AND
ROBERT HALF INTERNATIONAL, INC.,
PETITIONERS

v.

PEGGY HAWKINS-DEAN,
RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Nothing in Respondent's opposition, or in the Ninth Circuit's recent decision in *Abatie* v. *Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006) (*en banc*) ("*Abatie*"), casts any serious doubt on the urgent need for this Court to resolve the persistent circuit conflict over the impact of an "inherent" conflict of interest on judicial review of benefit decisions by ERISA plan administrators.

As explained in our petition, the circuits take three very different approaches to that question. The first approach, which we have called the "Restatement §187" approach, requires a court to affirm "a reasonable interpretation of the Plan . . . unless the *participants* can show not only that a potential conflict of interest exists, ... but that the 'conflict *affected* the reasonableness of the [plan's] decision.'" *Whitney* v. *Empire Blue Cross & Blue Shield*, 106 F.3d 475, 477 (2d Cir. 1997) (emphasis added). The second, sometimes called the "sliding scale approach," holds that "the court must decrease the level of deference given to the conflicted administrator's decision in proportion to the seriousness of the conflict." *Fought* v. *UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1004 (10th Cir. 2004), *cert. denied*, 544 U.S. 1026 (2005). And the third or "presumptively void" approach requires a reviewing court to apply a *de novo* standard unless the *administrator* affirmatively establishes that the potential conflict did *not* affect its decision. *E.g.*, *Brown* v. *Blue Cross & Blue Shield, Inc.*, 898 F.2d 1556, 1567 (11th Cir. 1990). In *Abatie*, the Ninth Circuit moved from the third approach to the second—and in so doing openly acknowledged that the legal standard applied in *this* case (and articulated in *Atwood* v. *Newmont Gold Co.*, 45 F.3d 1317 (9th Cir. 1995)) conflicts with *Firestone* v. *Bruch*, 489 U.S. 101 (1989).

Respondent's effort to minimize the importance of this three-way conflict falls wide of the mark, as does her suggestion that this case is not a good vehicle with which to resolve that conflict.

I. *Abatie* Itself Establishes That The Existing Circuit Conflict Is Wide, Deep, Mature And Important.

Respondent concedes (Opp. at 8) that the Second and Eleventh circuits both employ a "different standard" from the model now employed by the Ninth Circuit. Yet Respondent attempts to minimize the resulting conflict by contending (1) that the Second and Eleventh are the "only" circuits that now apply a different standard and (2) that the standards in those circuits are only "slightly different" from the sliding scale approach. *Id.* Both assertions are incorrect.

1. In *Abatie*, the Ninth Circuit stated clearly that its new standard conflicts with decisions in the First, Second, Seventh and Eleventh Circuits.[1] *Abatie at* n. 6. The Ninth Circuit

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[1] The following passage from *Abatie* describes the contrary precedent: "Other circuits have developed *different* approaches to determine the applicable standard of review in ERISA benefits denial cases. *See, e.g., Rud* v. *Liberty Life Assurance Co.*, 438 F.3d 772, 777 (7th Cir. 2006) (holding that a structural conflict of interest, without more, does not affect the standard of review and requiring the claimant to prove that the alleged conflict affected the administrator's decision); *Wright* v. *R.R. Donnelley & Sons Co. Group Benefits Plan*, 402 F.3d 67, 74 (1st Cir. 2005) (holding that an inherent conflict of interest does not necessarily affect the abuse of discretion standard, and placing the burden on the claimant to demonstrate that a conflict exists); *HCA Health Servs., Inc.* v. *Employers Health Ins. Co.*, 240 F.3d 982, 993-94 (11th Cir. 2001) (applying *de novo* review, initially, to decide whether the claim was wrongly decided, and if an inherent conflict of interest exists, requiring the administrator to prove that its interpretation was not tainted by self-interest); *Sullivan* v. *LTV Aerospace & Def. Co.*, 82 F.3d 1251, 1255-56 (2d Cir. 1996) (requiring a claimant to show that a conflict of interest affected the reasonableness of the administrator's decision; if the claimant carries that burden then *de novo* review applies). *Abatie* at n.6. This passage is a clear acknowledgement of the persistent circuit conflict.

Disputing the *Abatie* holding, in part, Respondent argues (Opp. at 7) that the First Circuit actually applies a "sliding scale"

also noted that its approach is similar to that of the Third, Fourth, Fifth, Eighth and Tenth Circuits. *Id.* at 964-965.[2] Thus, even according to the Ninth Circuit, the current breakdown among the Circuits is 3-6-1 – a very wide split.

Moreover, as explained in the petition, the Sixth Circuit also applies a "Restatement § 187" approach. *See* Petition at 11 (discussing *Peruzzi* v. *Summa Medical Plan*, 137 F.3d 431, 433 (6th Cir. 1998)); *see also Davis* v. *Kentucky Fin. Cos. Retirement Plan*, 887 F.2d 689, 694 (6th Cir. 1989); *Gismondi* v. *United Techs. Corp.*, 408 F.3d 295, 299 (6th Cir. 2005).[3] Thus,

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approach rather than the "Restatement § 187" approach applied by the Second and other circuits. But she is wrong. One of the two decisions on which Respondent relies—*Doe* v. *Travelers Ins. Co.*, 167 F.3d 53 (1st Cir. 1999)—expressly *rejected* a variant of the sliding scale approach, a variant that calls on courts to apply abuse of discretion review with "more bite" in the face of a structural conflict. Instead, the Court held that the "requirement that [the administrator's] decision be 'reasonable' is the basic touchstone in a case of this kind and ... fine gradations in phrasing are as likely to complicate as to refine the standard." *Id.* at 57. And the other decision—*Janeiro* v. *Urological Surgery Professional Ass'n*, 457 F.3d 130 (1st Cir. 2006) - reiterated the First Circuit's long-standing position that "structural conflicts alone—those arising from the administrator's . . . own financial interests—are not sufficient to abandon the normal highly deferential review." *Id.* at 139 (citing *Wright, supra*). Both decisions thus conflict with the Ninth Circuit's holding in *Abatie* that a structural conflict requires something less than "the normal highly deferential review."

[2] In *Abatie*, the Ninth Circuit also injected into single-plaintiff benefits cases broad, class-action type discovery. It stated that, regardless of the reasonableness of the administrator's decision, where a "structural" conflict exists, the plaintiff may conduct wide-ranging discovery, outside the administrative record, to determine whether there is "evidence of malice, of self-dealing, or of a parsimonious claims-granting history." *Abatie*, 458 F.3d at 968.

[3] Respondent is likewise incorrect in contending (Opp. at 7) that the Sixth Circuit's standard is "essentially the same" as the Ninth

even with the Ninth Circuit's recent change of mind, the circuit split currently stands at 4-6-1. And we are aware of no indication that any other circuit is poised to reconsider its position on this critical issue.

2. Respondent is also incorrect in claiming that the "Restatement § 187" and "presumptively void" approaches are only "slightly different" from each other and from the "sliding scale" approach (Opp. at 8) or, as Respondent puts it elsewhere, that the differences "are more semantic than real" (Opp. at 1). Contrary to Respondent's argument, the Ninth Circuit obviously thought the difference between its prior "presumptively void" approach and its new approach was sufficiently important to resolve in an *en banc* proceeding, and to reverse a decade-old precedent (*Atwood*) that had been applied in more than 50 subsequent cases. And the Ninth Circuit thought the difference between its approach and the "Restatement § 187 " approach—which effectively accords a presumption of validity to the administrator's decision—was important enough to expressly reject the latter standard. See *supra* n. 1.

The differences among these approaches, therefore, are more than merely semantic. As any experienced litigator knows, and a vast body of law confirms, presumptions do matter. *See, e.g., McCormick on Evidence* § 344 (6th ed. 2006) (describing effects of presumptions in civil cases and noting that presumptions are "engrained in the law"); James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common*

Circuit's approach in *Abatie*. *Peruzzi*, which Respondent does not address, refutes that suggestion. And the lone Sixth Circuit case Respondent does cite–*Borda* v. *Hardy, Lewis*, 138 F.3d 1062 (6th Cir. 1998)—merely noted earlier dictum to the effect that application of the arbitrary and capricious standard "should be shaped by the circumstances of the inherent conflict of interest." *Id.* at 1069. The court then went on to *reject* the plaintiff's attack on the trustee's decision, concluding that it could not be overturned "without bending the standard entirely out of shape." *Id.*

Law 314 (1898) (noting importance of presumptions not only to evidence law but to the "much larger topic . . . of legal reasoning" itself). Thus, the "Restatement § 187" approach—which says that an administrator's decision will be subject to deferential review unless the *plaintiff* demonstrates that the potential conflict had an *actual* effect on the decision—is much more likely to result in a decision in favor of the administrator than the polar opposite "presumptively void" standard, i.e., that the decision is presumed unreasonable unless the ERISA *administrator* proves that the potential conflict did *not* affect the decision. [4]

These contrasting standards are also likely to produce substantially different results in real-life litigation than the standard adopted by the Ninth Circuit in *Abatie*, i.e., that an administrator's decision will be treated more deferentially the more "minor" the conflict is, and less deferentially the more "egregious" the conflict is. 458 F.3d at 968. Given the inherent difficulty of applying deference by degrees, the *Abatie* standard very likely means, in practical effect, that a reviewing court will engage in *either* deferential or *de novo*

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[4] The Court clearly outlined this issue in *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 384 n.15 (2002) "An issue implicated by this case but requiring no resolution is the degree to which a plan provision for unfettered discretion in benefit determinations guarantees truly deferential review. In *Firestone Tire* itself, we noted that review for abuse of discretion would home in on any conflict of interest on the plan fiduciary's part, if a conflict was plausibly raised. That last observation was underscored only two Terms ago in *Pegram* v. *Herdrich*, 530 U.S. 211, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000), when we again noted the potential for conflict when an HMO makes decisions about appropriate treatment, *see id.*, at 219-220, 120 S. Ct. 2143. It is a fair question just how deferential the review can be when the judicial eye is peeled for conflict of interest. Moreover, as we explained in *Pegram*, 'it is at least questionable whether Congress would have had mixed eligibility decisions in mind when it provided that decisions administering a plan were fiduciary in nature.'" *Id.* at 232.

review, after the court evaluates the conflict and the evidence supporting and opposing the administrator's benefit decision. Thus, in any given case, that standard will likely produce a result that is the opposite of either the "presumptively void" standard or the Restatement § 187 standard.

3. Nor can there be any doubt that this circuit conflict is desperately in need of resolution. In the seventeen years since *Firestone*, literally hundreds of judges have devoted hundreds of pages discussing the meaning of one sentence of dicta in that decision: "[o]f course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.' Restatement (Second) of Trusts 187, Comment *d* (1959).'" *Firestone*, 489 U.S. at 957. As demonstrated above and in the petition, the circuits have virtually all attempted but failed to settle on a single interpretation of that sentence. And several decisions have urged this Court to resolve the issue.[5]

Resolution of the circuit split is also urgently needed as a matter of simple fairness: As a result of the present conflict, administrators of national benefit plans now face at least three separate standards of review in the circuit courts. Thus, the same type of benefit decision can be approved in one circuit and rejected in another based solely on the standard of review employed by that circuit. Only this Court

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[5] *E.g.*, *Mario* v. *P & C Food Mkts.*, 313 F.3d 758, 763 n.3 (2d Cir. 2002) (noting that "[t]he correctness—and wisdom—of the *Firestone* decision . . . has been cogently challenged by the country's leading ERISA scholar); *Pinto* v. *Reliance Std. Life Ins. Co.*, 214 F. 3d 377, 383 (3rd Cir. 2000); *Pagan* v. *NYNEX Pension Plan*, 52 F. 3d 438, 442 (2nd Cir. 1995); *Wallace* v. *Reliance Standard Life Ins. Co.*, 318 F. 3d 723, 724 (7th Cir. 2003). Needless to say, we believe that *Firestone* was correctly decided, and that what we have called the "Restatement § 187 approach" is most consistent with that decision as well as the underlying statute. *See* Petition at 14.

can bring resolution to this issue. As two scholars have recently put it, "[t]he fact that different judges, sometimes within the same circuit, still disagree about what *Firestone* requires, reinforces the drastic need to clarify and simplify this chaos." Donald Bogan & Benjamin Fu, *No Further Inquiry into a Conflicted Plan Administrator Claim Denials*, 58 Okla. L. Rev. 637, 655 (2005).

II. This Case Is An Excellent Vehicle With Which To Resolve The Existing, Acknowledged Circuit Conflict.

This case is also a compelling vehicle for resolution of the conflict. The relevant facts are well developed and the issues clearly defined. Moreover, contrary to Respondent's argument (Opp. at 9-12), the different alternative standards likely *would* have an impact on the resolution of this case. Respondent's assertion to the contrary— that "the *only* reasonable application of the plan's formula for determining benefits is the calculation Ms. Hawkins-Dean sought and the Ninth Circuit ordered" (Opp. at 9) (emphasis added)—flatly misreads the Ninth Circuit opinion and the record below.

To be sure, the Ninth Circuit reviewed the record and found, contrary to the district court, that Respondent had provided evidence of a conflict of interest which Petitioner failed to rebut.[6] However, contrary to Respondent's assertion, the Circuit did *not* find only one reasonable application of the plan language. In fact, the Circuit was forced to use a rule of contract interpretation, *contra proferentem*, which applies only when necessary to resolve a conflict between *two* reasonable interpretations of the benefit plan. Pet. App. 3; see, *e.g.*, *Kunin* v. *Benefit Trust Life Ins. Co.*, 910 F.2d 534, 539 (9th Cir. 1990) ("A typical statement of the rule is that if, af-

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[6] Aside from the "structural" conflict inherent in the fact that the administrator was also funding the benefits, the sole evidence of conflict was Petitioner's change of mind in *favor* of Respondent's eligibility for benefits. Still the Circuit reviewed the administrator's decision *de novo*.

ter applying the normal principles of contractual construction, the insurance contract is fairly susceptible of two different interpretations, another rule of construction will be applied: the interpretation that is most favorable to the insured will be adopted.") (Citation omitted).

Thus, the Ninth Circuit's own decision in this case establishes that Petitioner's reading of the plan was reasonable, and therefore that Petitioner's action would have been upheld under the kind of unqualified reasonableness standard applied in the First and Second Circuits, among others. And because the conflict of interest is not a serious one (see Pet. App. 2), Petitioner's action would likely be upheld under the "sliding scale" standard applied in several other circuits. Accordingly, this case provides an ideal vehicle by which the Court can choose among the various approaches and, in so doing, resolve the circuit conflict outlined above.

III. In The Alternative, Because The Ninth Circuit Held After The Filing Of This Petition That The Standard Of Review It Applied In This Case Misinterprets *Firestone*, The Court Should Grant, Vacate And Remand.

If the Court nevertheless declines to hear the case on its merits, Petitioner requests that the Court grant the Petition, vacate the Ninth Circuit's decision and remand for further proceedings. This Court routinely exercises its power to grant, vacate and remand (28 U.S.C. § 2106) when a supervening event "alters the basis upon which the judgment rests. . ." *State Farm Mut. Auto. Ins. Co.* v. *Duel*, 324 U.S. 154, 161 (1945). Indeed, in *Lawrence* v. *Chater*, 516 U.S. 163, 165-167 (1996) (*per curiam*), the Court made clear that the grant, vacate and remand procedure is appropriate where three conditions are satisfied:

(1) there are "intervening developments";

(2) these developments give rise to "a reasonable probability that the decision below rests upon a

premise that the lower court would reject if given the opportunity for further consideration"; and

(3) "such a redetermination may determine the ultimate outcome of the litigation."

Id. at 167. Each of these requirements is satisfied here.

First, there has been an important intervening development, specifically, the holding by the Ninth Circuit, after the filing of our petition, that the standard of review applied in this case was incorrect. In the decisions below, the Ninth Circuit and the District Court relied upon the "presumptively void" standard of review adopted in *Atwood*. However, in *Abatie*, the Ninth Circuit overruled *Atwood* "in its entirety." *Abatie* at 967. In so doing, the Ninth Circuit repeatedly acknowledged that the *Atwood* standard conflicts with this Court's decision in *Firestone*: "*Atwood* ignores the Supreme Court's requirement that a court weigh as a 'factor' in abuse of discretion review the conflict of interest that inheres when a plan administrator also acts as its fiduciary." *Id.* at 966. Moreover, "*Atwood*'s back-and-forth burden shifting disobeys the Supreme Court's guidance." *Id.*

Second, it is not merely probable, but certain, that if this case were being heard today by a Ninth Circuit panel, it would reject *Atwood* and apply the *Abatie* standard.

Third, a remand *may* determine the ultimate outcome of this litigation because, under the *Abatie* decision, there is no necessary presumption that the administrator's decision was wrong. Thus, although petitioner believes that the costs of a remand (which would delay resolution of the circuit conflict described above) far outweigh any benefit to this Court of yet another decision from the Ninth Circuit,[7] it is possible

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[7] As the Court stated in *Lawrence*, "if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." 516 U.S. at 168.

that the Ninth Circuit would reach the correct result if this case were remanded.

Finally, as the Court pointed out in *Griffith* v. *Kentucky*, 479 U.S. 314, 323 (1987), if the Court is unwilling to grant plenary review, a failure to remand under these circumstances "violates the principle of treating similarly situated defendants the same . . .".

For all of these reasons, the Court should grant the petition, and vacate and remand the judgment below, if the Court does not wish to grant plenary review.

CONCLUSION

The petition for writ of certiorari should be granted.

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